IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 374

BOB-LO EXCURSION COMPANY,
Appellant,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,
Appellee

Appeal from the Supreme Court of the State of Michigan

REPLY BRIEF FOR BOB-LO EXCURSION COMPANY, APPELLANT

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SUBJECT INDEX

	Page
Additional Statement of the Case	1
Argument:	
(a) Appellant is engaged in substantial foreign commerce	3
(b) Michigan Statute is invalid	4

CITATIONS

Butts v. Merchants etc. Transportation Co., 230 U. S. 126	4
Civil Rights Cases, 109 U. S. 3	4
Freeman v. Hewit, 91 L. Ed. 205	6
Hall v. DeCuir, 95 U. S. 485	5
Lord v. Goodall S. S. Co., 102 U. S. 541	6
Mitchell v. U. S., 313 U. S. 80	4
Morgan v. Virginia, 328 U. S. 373	6
Pryce v. Swedish American Lines, 30 Fed. Supp. 371	6
16 C. J. Secundum, 164, 5	4

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STATEMENT OF THE CASE

Appellant has no objection to the additional facts shown in the brief of appellee (other than believing them to be immaterial and possibly leading the reader to believe this is a case involving assault and battery, instead of what

it actually is, i.e., an exclusion of a colored person from foreign commerce), but with these other facts it should perhaps be pointed out that when the colored person was refused transportation at Detroit Michigan to Bob-Lo Island Canada, she was tendered the cost of her ticket in accordance with its terms, "Right reserved to reject this ticket by refunding the purchase price" (R. 7), which tender was refused (R. 4). Transportation from Bob-Lo to Amherstburg is not forbidden by Canadian authorities as intimated by counsel (R. 11).

ARGUMENT

(a) APPELLANT IS ENGAGED IN SUBSTANTIAL FOREIGN COMMERCE.

Appellee now for the first time concedes appellant to be engaged in foreign commerce, although throughout his brief he claims it to be "technical rather than substantial" (6), and "infinitesimal" (14). With these qualifications appellant completely disagrees. On the contrary a business corporation annually carrying approximately 500,000 persons (R. 7, 8) from Detroit to Canada, and using in Canada facilities for its passengers costing over half a million dollars (R. 6) to say nothing of the large value of its Detroit waterfront property and docks and vessels each carrying over 3,000 passengers and all devoted to this foreign business (R. 6), is very substantially engaged in a very real foreign commerce and of no "infinitesimal" proportions.

Appellee's counsel on page 14 of his brief confuses appellant's business which is foreign commerce, with the object of its passengers. Whether its passengers travel from Detroit to Canada for a "commercial purpose" is of no moment. What is important is that appellant is transporting them from Detroit to Canada as part of its foreign business. Appellee's brief in a number of places (6, 14) stresses the fact appellant is organized as a corporation under Michigan laws and is furnished police and fire protection by Detroit. This is of course immaterial as every domestic corporation is of necessity organized under the laws of some state and is furnished police and fire protection, but those facts have never prevented a corporation from claiming a state statute violates the fundamental law of the land any more than an individual is

estopped who resides in a State and is given police and fire protection therein. *16 C. J. Secundum*, 164, 5. Constitutional rights are not so easily snatched away.

(b) THE MICHIGAN CIVIL RIGHTS STATUTE MAY NOT CONSTITUTIONALLY BE APPLIED TO APPELLANT WHEN ENGAGED IN THE ABOVE FOREIGN COMMERCE ON ACCOUNT OF THE PROVISIONS OF THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

The cause before us is a business case arising under the Michigan Civil Rights Act and the Commerce Clause; *not* one arising under the Civil Rights Act and the 14th Amendment. Counsel for appellee on page 9, 10 of his brief apparently argues that the policy of the Congress would be to compel the furnishing of equal facilities, but that its attempt to do so was thwarted *under the 14th Amendment* by this Court in the Civil Rights Cases, 109 U. S. 3. (In the opinion in the Civil Rights Cases and in its later companion *Butts v. Merchants and Miners Transportation Company*, 230 U. S. 126, it was held the Federal Act was void under the 14th Amendment, but it pointed out that the Congress could under the Commerce Clause have passed such type of valid act affecting interstate or foreign commerce, but that the preamble of the Act there involved negatived any such intent of the Congress.) The Congress *under the Commerce Clause* may if it desires constitutionally require equal transportation facilities be furnished by appellant and all other interstate and foreign carriers by simple legislation thereunder. It has already so legislated for interstate rails, and interstate water carriers operating under a joint through rate, *Mitchell v. U. S.*, 313 U. S. 80. As stated in appellant's main brief (pp. 23, 4) the maxim *expressio unis est exclusio alterius* applies, and in this respect the position of appellant "is

stronger than if Congress had not so acted as to any carrier, for then there might at least be an argument made that Congress not having acted at all was leaving the entire field to the States."

Throughout the brief of the State of Michigan appear intimations that the identical case of *Hall v. DeCuir*, 95 U. S. 485 should not be followed as being out of harmony with what counsel chooses to call the "social policy" of certain Congressional legislation. (Attention however is not called to the expressed contrary social policy of Congressional legislation affecting the District of Columbia). Counsel is asking this Court to lend itself as an instrument of "social control" (page 9) as if no other method was available. As pointed out on pages 22, 23 and 24 of appellant's original brief the remedy for establishing a new "social policy" rests in this case not with the courts, but with the Congress. The Congress under the Commerce Clause has that authority i.e., to compel all such carriers to carry all equally. The Congress has not so legislated.

As stated in appellant's original brief the case before us cannot be distinguished from *Hall v. DeCuir supra*, and opposing counsel's brief (p. 8) admits the practical identity of the Michigan and the Louisiana Statutes. Each statute sought to *directly regulate* interstate or foreign commerce and the Louisiana Statute was held void as a *direct regulation* of such interstate commerce. One involved transportation on the Great Lakes waterway, the other on the Mississippi River; one between two countries, the other between two states; both by vessels; both with practically identical statutes. The two cases present the identical regulation, possible confusion, lack of uniformity, and burdens. *Counsel for the State of Michigan in his brief fails to point out a single burden which existed in the DeCuir case which does not exist in the case at bar.* As to

possible confusion and lack of uniformity (no *actual* confusion being required, only the *possibility* thereof) counsel for appellee ventures into the realm of prophesy in his prediction (13) that the foreign country of Canada (or Ontario) will never impose different racial transportation requirements than Michigan now imposes. When we consider that in our own country eighteen states "prohibit racial separation on public carriers," a substantial number require it, and in the remaining ten there is no legal provision thereon, *(Morgan v. Virginia,* 328 U. S. 373, 382), then of necessity one must be the seventh son of a seventh son to so prophesy. This court has stated it will not prophesy even as to the "laws of the various states at a particular moment." *Freeman v. Hewit,* 91 L. Ed. 205, 210.

Counsel for appellee in his brief (13) argues that because a foreign nation is here involved in appellant's foreign commerce, there may be no uniformity of law in the absence of a treaty. It is clear that such a situation *cannot enlarge* the right of a State to regulate foreign commerce; the reverse is true. Foreign commerce is national in character and *requires* treatment only by the Federal Government and not by the States, *Lord v. Goodall S. S. Co.,* 102 U. S. 541, 544. The effort of Michigan to apply its statute to appellant in its Canadian transportation business is in effect an attempt by the State to give its statute an extraterritorial force, for there is no *intra*-state portion of the voyge from Michigan to Ontario, because the vessels *immediately* upon leaving Detroit cross the international boundary (R. 8, Cf. *Morgan v. Virginia,* 328 U. S. 373 at page 386).

We also call the Court's attention to *Pryce v. Swedish American Lines,* 30 Fed. Supp. 371, an all fours case mentioned in appellant's original brief, and which appellee does not even attempt to distinguish.

Appellant believes (as set forth on pps. 16, 17 of its original brief) there is no difference whatever between *Hall v. DeCuir, supra,* and the case at bar, (except the unimportant facts that in the former the traffic was upon the Mississippi river between two States, and in the latter upon the connecting waters of the Great Lakes between two countries), and unless overruled *Hall v. DeCuir* is decisive and should be followed. Opposing counsel has been unable to point out a single additional burden which existed in the DeCuir case which does not exist in the case before us. Both statutes are *regulations* of interstate commerce. *Hall v. DeCuir* in effect created a rule of property and therefore is not to be capriciously distinguished as counsel has attempted to do, nor under the principle of *Stare Decisis* to be lightly overruled. Appellant has relied upon the DeCuir decision, based upon identical facts, and if it is not followed may face large pecuniary damages in civil actions based upon the treble damage section of the Michigan statute. Were the DeCuir case to be overruled the ensuing confusion might be well nigh catastrophic, (and a glance at the Citator will indicate what a leading case it has become and how many decisions it has sired, the last of such offspring being the recent case of *Morgan v. Virginia, supra).*

It is again respectfully submitted the cause should be reversed.

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